In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-834

JAMES G. DEMOPOULOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court committed reversible error by not holding an instruction conference, and that an instruction (to which petitioner first objected in a petition for rehearing *en banc*) was plain error because it amounted to a direction to the jury to convict petitioner.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of making a false material declaration before a grand jury, in violation of 18 U.S.C. 1623(a), and was sentenced to a term of eighteen months' imprisonment. A divided panel of the court of appeals affirmed (Pet. App. A; 506 F. 2d 1171), and a petition for rehearing and suggestion of rehearing *en banc* was denied (Pet. App. B).

Before the grand jury, petitioner denied that he met two individuals in the Rex Restaurant in Chicago, Illinois, during February 1969 and received money from them. At petitioner's trial for perjury, the two individuals in question testified that they had met him at the restaurant during that month and had passed to him money that was to be transmitted to a police captain as a bribe (Pet. App. 2-3). Petitioner asserted an alibi defense and claimed to have been in Greece at the time that the meeting was alleged to have occurred. Petitioner does not, however, challenge in his petition the sufficiency of the evidence against him.

The district court declined to confer with counsel concerning the instructions to be submitted to the jury. The court instead permitted counsel to make their objections on the record, but out of his presence, after the jury had retired. The court of appeals held that this procedure clearly violated Fed. R. Crim. P. 30, but concluded, following *Hamling* v. *United States*, No. 73-507, decided June 24, 1974, that violations of Rule 30 are not reversible error if the record clearly discloses that the error did not prejudice the accused (Pet. App. 11). The court then considered petitioner's five specifications of error in the instructions given by the court and correctly concluded that, because the instructions were not erroneous, petitioner was not prejudiced by the failure to hold an instruction conference (Pet. App. 11-14). This decision is consistent with *Hamling*. The cases relied upon by petitioner as establishing a conflict among the circuits in their treatment of violations of Rule 30 all antedated *Hamling* and consequently do not require reconciliation by this Court.

In his petition for rehearing *en banc*, petitioner challenged for the first time a sixth instruction. He offers here only this last instruction in support of his claim that he was prejudiced by the lack of an instruction conference. Petitioner's tardiness in noticing this "error" refutes his contention. Petitioner did not object on the record at trial to this aspect of the instructions and did not challenge it on appeal. Because the purpose served by the instruction conference is to afford counsel an opportunity to press his objections to the trial judge before the charge is given to the jury, petitioner cannot claim that he was prejudiced by the denial of an opportunity for his counsel to make contentions that did not occur to counsel until some months later.

In any event, there was no error in the instructions. Petitioner contends that the trial judge improperly "directed" a verdict of guilty by instructing the jurors that if they found beyond a reasonable doubt that petitioner was accurately identified as a participant in the events charged in the indictment, they "must find him guilty", and that if they found beyond a reasonable doubt that he was at a specified location (the Rex Restaurant) on a specified date they "should find him guilty."[1] These instructions did not "direct" the jury to convict petitioner but simply informed the jury of its responsibility to convict if it found beyond a reasonable doubt the disputed elements of the offense.

United States v. *Hayward*, 420 F. 2d 142 (C.A.D.C.), upon which petitioner relies, is not to the contrary. The *Hayward* court did not conclude that an instruction

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[1]Each instruction was coupled with an instruction that if the jurors *had* a reasonable doubt as to the accuracy of the identification or as to petitioner's presence at the location at the relevant time they "must" and "should" find him not guilty (Pet. App. 25-26).

directs a guilty verdict solely because it contains the phrase "you must find the defendant guilty", but rather because, in the circumstances of a murder prosecution, an instruction that guilt "must" be found if the jurors *disbelieved* the defendant's alibi *defense* had the effect of "eliminating other relevant considerations if the jury finds one fact to be true." 420 F. 2d at 144; see also *United States* v. *Musgrave*, 444 F. 2d 755, 763 (C.A. 5); *United States* v. *Bosch*, 505 F. 2d 78, 82 (C.A. 5). In this case no relevant factual issues were eliminated from the jury's consideration by the use of the peremptory language. The offense with which petitioner was charged was falsely denying that he had been in the Rex Restaurant and received money from two individuals at a specified time. The ultimate issue for the jurors to decide was thus whether petitioner had been accurately identified as the individual who was present and received the money at that time. A finding on that factual issue beyond a reasonable doubt was therefore conclusive on the question of guilt, and it was not error for the jurors to be so instructed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.